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SUPREME COURT U.S.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1905.

No. ~~119~~. 125

DANIEL REDBIRD, ET AL., CITIZENS OF THE CHEROKEE NATION BY BLOOD, Appellants,

vs.

THE UNITED STATES.

No. ~~120~~. 126

THE CHEROKEE NATION, Appellant,

vs.

THE UNITED STATES.

No. ~~121~~ 127

FRANCIS B. FITE, ET AL., INTERMARRIED WHITE PERSONS, CLAIMING TO BE ENTITLED TO CITIZENSHIP IN THE CHEROKEE NATION,

Appellants,

vs.

THE UNITED STATES.

No. ~~122~~ 128

THE PERSONS CLAIMING RIGHTS IN THE CHEROKEE NATION BY INTERMARRIAGE, Appellants,

vs.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

PETITION FOR REHEARING ON BEHALF OF PERSONS CLAIMING RIGHTS IN THE CHEROKEE NATION BY INTERMARRIAGE.

By WILLIAM T. HUTCHINGS,
JAMES S. DAVENPORT,
Their Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1905.

No. 419.

DANIEL REDBIRD, ET AL, CITIZENS OF THE CHEROKEE NATION BY BLOOD, Appellants.

vs.

THE UNITED STATES.

No. 420.

THE CHEROKEE NATION, Appellant,

vs.

THE UNITED STATES.

No. 421.

FRANCIS B. FITE, ET AL, INTERMARRIED WHITE PERSONS, CLAIMING TO BE ENTITLED TO CITIZENSHIP IN THE CHEROKEE NATION,

Appellants,

vs.

THE UNITED STATES.

No. 422.

THE PERSONS CLAIMING RIGHTS IN THE CHEROKEE NATION BY INTERMARRIAGE, Appellants,

vs.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

PETITION FOR REHEARING ON BEHALF OF PERSONS CLAIMING RIGHTS IN THE CHEROKEE NATION BY INTERMARRIAGE..

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The citizens claiming rights in the Cherokee Nation by intermarriage come now, and respectfully petition this Honorable Court for rehearing of said cause for the following reasons, to-wit:

First: Because this Court erred in accepting the conclusion of the Court of Claims that "white persons residing in the Cherokee Nation as became Cherokee citizens under Cherokee laws by intermarriage with Cherokees by blood, prior to the 1st day of November, 1875, are equally interested in and have equal per capita rights with Cherokee Indians by blood in the land constituting the public domain of the Cherokee Nation, and are entitled to be enrolled for that purpose, but such intermarried whites acquire no rights and have no interest or share in *any funds* belonging to the Cherokee Nation, except where such funds were derived by lease, sale or otherwise from the lands of the Cherokee Nation conveyed to it by the Untied States by patent of December, 1838."

Section 26 of the Cherokee Agreement which this Court was called upon to construe, states that the purpose of the roll was to determine who was entitled "to participate in the distribution of the tribal property in the Cherokee Nation.

Section 29 shows plainly that there was to be no distinction made as to property rights between those who should be placed upon that roll; either a person was not entitled to go upon the roll, or, if his name was placed upon it, then he was to share equally in the lands and tribal property of the nation. This roll was to be prepared in lists, to be approved by the Secretary of the Interior. These lists should contain "the names of all those lawfully entitled to enrollment." Then, in plain, unambiguous language, section 29 of this agreement states that

these lists should constitute the final roll of citizens of the Cherokee Nation, and that upon this roll "allotment of land and distribution of other tribal property shall be made."

To make this more plain, section 31 states that no person whose name does not appear on this roll shall get any of the common property, and then states that "those whose names appear thereon, shall participate in the manner set forth in this Act." What, then, was this manner? It was that every single name upon it shall be entitled equally with every other name to an equal amount of land and the equal distribution of other tribal property. Other provisions of the treaty make impossible any other construction. It is admitted that the intermarried whites who married prior to the 1st day of November, 1875, get allotments. They are therefore allottees. Section 60 of the Cherokee Agreement says that the acceptance of a patent by the allotee serves to relinquish all of his right to the lands of the nation, "except in the proceeds of lands reserved from allotment." It was presumed that there would be more land than was sufficient to give each one an allotment; this was to be sold, and distributed among the citizens. It is plain then that each allottee was to get his share of the proceeds of the sale of this surplus. This is mainly important in construing section 66 of the ageement which says that "all funds of the tribe and all moneys accruing under the provisions of this Act shall be paid out under the direction of the Secretary of the Interior, and, when required, per capita payments shall be paid directly to each individual by an appointed officer of the United States, under the direction of the Secretary of the Interior." Undoubtedly it shows that each allottee shares in the proceeds of the sale of surplus land. The foregoing section shows that every man that shares in said money, likewise must share in *all the funds* of the tribe. This is further made plain in section 67 which provides for a "pro rata distribution of the *funds* of the tribe" after its debts are paid, showing clearly that every citizen whose name goes on the roll at all shall be paid a pro rata share

of all the *funds* of the tribe, and all *moneys* arising from the sale of lands reserved from allotment.

There can be no such thing under the agreement as a partial distribution to any set of citizens. A man either shares in no way in the benefits of this agreement, or shares equally with every other citizen entitled to such benefits, the Registered Delawares alone being especially excepted; section 23.

Some exception has been taken to the calling of this agreement a treaty. It is even of greater force and obligation than a treaty. Congress can repeal or modify treaties by an Act of Congress. An Act of Congress can repeal or modify any law of the Cherokee Nation. These propositions are too plain to need argument or citations. This law was ratified by the citizens of the Cherokee Nation, and it stands as the last expression of the law acquiesced in by the United States and the Nation itself. It repealed everything inconsistent with it that went before, and must govern in all matters of citizenship and distribution of the common property of the Nation.

The Curtis Bill, in section 21, stated unequivocally that the rolls so made "shall alone constitute the several tribes which they represent." Every man on the roll is a member of the tribe, and must share with every other member of the tribe in the equal distribution of the tribal property of whatsoever kind or character, except as provided in section 25 of that same Act, which excepted the Delawares, and made them subject to the findings of this Court.

There is no treaty, Cherokee law or Act of Congress making any such distinction, or in any way qualifying the rights of such citizens and we most respectfully submit that the reasoning sustaining the position would hardly "satisfy the son of Caesar."

Second: Because every person whose name appears on the roll of 1880 must be enrolled for the purpose of sharing in the common property of the Nation. It is true that this was a census roll, but Congress and the Nation agreed that the Com-

mission to the Five Civilized Tribes could not go behind that roll. The Act does not say that they must enroll all *citizens* on that roll, but says after denominating it a roll of citizens that the Commission must enroll "all *persons* now living whose names are found on said roll." The Commission was authorized to investigate the right of all other persons found on any *other* rolls, and to omit such as had gotten on those rolls improperly, but they had no authority to look into the name or status of any person whose name was found on the roll of 1880. Language can certainly not be plainer than that. The Court of Claims found in express terms (Record page 60) that the names of certain white persons who only represented a class, appeared on the census roll of 1880, and that those names were the very persons whose names are found on the roll of 1880 and that were referred to and included in section 21 of the Act of Congress of July 28, 1898, commonly called the Curtis Bill. There might be some show of argument if the Commission had been directed to enroll the *citizens* whose names were found on said roll, but nothing can be plainer than the direction which is given in that Act that they should enroll *all persons* whose names are found on said roll. There seems to us no possible escape from this language, whatever construction might be placed upon the balance of the Act. It is true that in section 21, in the latter part of it, is used the expression, "enrolling only such persons as may have lawful right thereto," and that there occurs a somewhat similar expression in the Act of 1900, but the law had already said that all on the roll of 1880 had a lawful right to enrollment, and such expression in section 21 applied to the power given to the Commission to investigate the claims of persons found on other rolls, or who derived rights from other sources, and did not give them any power to investigate the names of persons found on the roll of 1880, and the Commission and the Interior Department have always so construed the Act.

Third: The finding of the Court of Claims was erroneous which held that "those white persons who intermarried with

Delaware or Shawnee citizens of the Cherokee Naton either prior or subsequent to November 1, 1875, have no part or share in the Cherokee property, and are not entitled to participate in the allotment of lands or the distribution of the funds of the Cherokee Nation." The Delawares and Shawnees certainly bought and paid for their rights and when the Delawares became members of the Cherokee Nation, they, under the agreement with the Cherokees, became such members, "with the same rights and immunities * * * * * as native Cherokees."

The agreement with the Shawnees was that they became members of the Nation "on equal terms in every respect and with all the privileges and immunities as native citizens of the Cherokee Nation."

With such rights, and endowed with such privileges for which they paid, marriage to their women or men certainly conferred upon the white person the same rights of property, at least, prior to the 1st day of November, 1875, as marriage with other Cherokee citizens had conferred. This is right and just; they were Cherokees in every respect and the Cherokees could make no law, and did not attempt to do so, that would distinguish between the rights which their blood citizens could confer by marriage and the rights which Delaware and Shawnee citizens could confer by such marriage.

Fourth: If Congress and the Cherokee people had meant to say that no whites should participate in the distribution of the tribal property of the Nation who had intermarried with a Cherokee citizen since the 1st day of November, 1875, it would certainly have been the easiest thing in the world to have said so, and it would have been very strange for them to have set as the time to stop enrolling them a date almost exactly twenty years later. The title to the lands was in the Nation, not held in common by the members. Power was given the intermarried citizens to vote that title out of the nation to the individual citizen; the same law making power could authorize them to vote

it to themselves among other citizens. Everybody so interpreted the language of the Act. It was voted for or against with that construction on its language, and for nearly two years that construction was acted upon and acquiesced in.

Fifth: It is found in the opinion of the Court that the improvements made by all lawfully intermarried whites on the public domain of the Cherokee Nation are their property. Now, this case was submitted early last spring. Had a decision been rendered in the ordinary course of things, they might readily have protected their rights before Congress. If no rehearing is given, the mandate goes down before Congress meets, and creates great confusion in the settlement of questions arising out of such rights. One member of the Court, at least, had resigned prior to the rendering of the decision, and we believe that the ends of justice would be met by at least granting a reasonable time for a rehearing in this case, and that if such is given, we would be enabled to convince the Court that the judgment in this case must in some material points at least be modified.

Your petitioners pray, therefore, that an order may be made for a rehearing of the argument in this case on a day to be appointed by this Court at the present term and upon such points as the Court may direct.

By WILLIAM T. HUTCHINGS,
JAMES S. DAVENPORT,
Their Counsel.

CERTIFICATE OF COUNSEL.

The undersigned counsel for persons claiming rights in the Cherokee Nation by intermarriage, believing that the ends of justice would be served by a rehearing of this case before a full bench, and believing also that the facts stated in the petition for rehearing constitute a good ground for asking a rehearing in this case, so certify in support of the petiton as required by the rule of this Court.

November 17th, 1906.

WILLIAM T. HUTCHINGS,

Of counsel for the persons claiming rights in the Cherokee Nation by intermarriage.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

Nos. 125, 126, 127, and 128.

DANIEL RED BIRD ET AL., *Citizens of the Cherokee Nation by Blood, Appellants,*
vs.
THE UNITED STATES. } 125.

THE CHEROKEE NATION, *Appellant,*
vs.
THE UNITED STATES. } 126.

FRANCIS B. FITE ET AL., *Intermarried White Persons, Claiming to be Entitled to Citizenship in the Cherokee Nation, Appellants,*
vs.
THE UNITED STATES. } 127.

THE PERSONS CLAIMING RIGHTS IN THE CHEROKEE NATION BY INTERMARRIAGE, *Appellants,*
vs.
THE UNITED STATES. } 128.

APPEALS FROM THE COURT OF CLAIMS.

Come now the Cherokee citizens by blood in the above-entitled cases and move for an amendment to the opinion and judgment of the court, filed November 5, 1906, so as to exclude all intermarried white persons except those two persons who were found by the Court of Claims to have paid into the common treasury of the Cherokee Nation the sum of five hundred dollars.

The decree of the Court of Claims (40 Ct. of Cls., 447) excludes all intermarried whites except those, residing in the Cherokee Nation, who intermarried with Cherokees by blood prior to the 1st day of November, 1875.

This court (page 4, Pamphlet Decree) says:

> "The act (of 1855) was administrative and aimed at subjecting the intermarried whites to the control and dominion of the Cherokee laws instead of leaving them responsible solely to the laws of the Government of the United States. *It contains nothing indicating the intention to confer property rights on intermarried whites.* But in respect of the public domain, the Court of Claims, in the present case, because of the opinion in Journeycake's case, (155 U. S., 196) *assumed* that the acquisition of citizenship under Cherokee laws carried the right to share therein, unless forbidden by such legislation."

Further the court says (pages 5 and 6):

> "Assuming that the national council had authority under the Cherokee constitution of 1839 and the amendments of 1866, to confer on white intermarried citizens the privilege of purchasing a right in the soil and funds of the nation, that privilege was withdrawn in two years and, according to the facts found, was only availed of by two persons, neither of whom was an individual party to the suit. No right in the nation's property flowed from the Cherokee citizenship act, which merely subjected the white man to the jurisdiction of the nation, but that right resulted from express grant and the payment of a price."

The court takes the same view with reference to the amendments to the Cherokee constitution. It says (page 7):

> "We cannot accept the view that this amendment amounted to a grant of property rights, or operated to enlarge the authority of the national council in respect of the readmission of former members of the nation. The amendment (found in that part of the constitution in respect to offices and elections) must

be taken as a whole, and related to eligibility to a seat in the national council and not to property rights."

Further the court says (page 8):

> "These intermarried whites show no grant of equal rights as members of the Cherokee Nation by treaty or otherwise, nor have they (excepting the two individuals heretofore referred to) paid any sum into the nation's treasury for a pro rata share of its money and lands."

Clearly, the court intended that all intermarried whites should be excluded except the two who have paid into the Cherokee national treasury five hundred dollars each, found as a fact by the Court of Claims.

I respectfully move the court to add to its judgment and opinion the following:

> "The decree of the Court of Claims in this case should be amended by excluding all intermarried white persons, except the two persons who have paid into the Cherokee national treasury the sum of five hundred dollars each, and that as so amended, the decree should be affirmed."

Respectfully submitted,

JOHN J. HEMPHILL,
Attorney for the Cherokee Indians by Blood.

K. S. MURCHISON,
Of Counsel.